

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

Office of Financial and Insurance Regulation
Petitioner

v

Case No. 08-5766

Cary Heller
Respondent

For the Petitioner:

Marlon F. Roberts
Office of Financial & Insurance Regulation
P.O. Box 30220
Lansing, MI 48909-7720

For the Respondent:

Scott A. Warheit
Miller Canfield
840 W. Long Lake Road, Suite 200
Troy, MI 48098-6358

Issued and entered
this 29 day of December 2008
by Ken Ross
Commissioner

FINAL DECISION

BACKGROUND

This case concerns the application of Respondent Cary Heller for a resident insurance producer license. Mr. Heller filed his application with the Office of Financial and Insurance Regulation on April 1, 2008. On the application, Mr. Heller disclosed that in 2007 he had been convicted of a felony. The license application was denied based on the existence of the conviction. Mr. Heller appealed the license denial and requested a hearing.

An Order Referring Complaint for Hearing and Order to Respond was issued on September 16, 2008. Mr. Heller filed his answer on October 7, 2008.

On October 20, 2008, the Petitioner filed a Motion for Summary Decision pursuant to this agency's Hearing Rule 11 (1983 AACRS R 500.2111) asserting that there is no genuine issue as to any material fact in this case and that Petitioner is, therefore, entitled to a decision in its favor as a matter of law. Mr. Heller filed a response to the motion on November 12, 2008.

On November 24, 2008, the parties filed a Joint Stipulation Waiving Evidentiary Hearing, the parties agreeing that there were no disputed issues of fact to be resolved in the case.

ANALYSIS

Hearing Rule 11 provides:

A party may move for a summary decision in the party's favor upon any 1 of the following grounds:

- (a) The commissioner lacks jurisdiction over the person or the subject matter.
- (b) The opposing party has failed to state a claim upon which relief can be granted.
- (c) There is no genuine issue as to any material fact and the moving party is therefore entitled to a decision in that party's favor as a matter of law.

It is appropriate that the matter be resolved by summary decision under Rule 11 because, as the parties correctly note, there are no genuine issues of material fact in this case. The following facts are not in dispute:

- In 2007, Respondent was convicted in United States District Court, Eastern District of Michigan, of the felony conspiracy to manufacture and distribute and possess with intent to distribute, marijuana, 21 USC 841(a)(1) and 846. Respondent was sentenced in September 2007 to six months of home confinement and two years of supervised release.

- Respondent applied for a Michigan insurance producer license in April 2008. He was denied the license because of his felony conviction.

The following provisions of the Michigan Insurance Code apply when reviewing insurance producer licensing applications:

Section 1205(1)(b), MCL 500.1205(1):

(1) A person applying for a resident insurance producer license shall file with the commissioner the uniform application required by the commissioner and shall declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the individual's knowledge and belief. An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following:

* * *

(b) Has not committed any act that is a ground for denial, suspension, or revocation under section 1239.

Section 1239(1)(f), MCL 500.1239(1)(f):

In addition to any other powers under this act, the commissioner may place on probation, suspend, revoke, or refuse to issue an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions for any 1 or more of the following causes:

* * *

(f) Having been convicted of a felony.

Respondent argues that the Commissioner must also apply the standards of the Occupational License for Former Offenders Act (Act 381 of 1974, MCL 338.41 *et seq.*) when evaluating insurance producer licensing applications. This Act provides guidance for state officials who are required to make licensing decisions where "good moral character" is a requirement for receiving a professional or occupational license.

Section 1(1) of Act 381, MCL 338.41(1), provides:

The phrase "good moral character", or words of similar import, when used as a requirement for an occupational or professional license or when used as a requirement to establish or operate an organization or facility regulated by this state in the Michigan Compiled Laws or administrative rules promulgated under those laws shall be construed to mean the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner.

Section 2 of Act 381, MCL 338.42, provides:

A judgment of guilt in a criminal prosecution or a judgment in a civil action shall not be used, in and of itself, by a licensing board or agency as proof of a person's lack of good moral character. It may be used as evidence in the determination, and when so used the person shall be notified and shall be permitted to rebut the evidence by showing that at the current time he or she has the ability to, and is likely to, serve the public in a fair, honest, and open manner, that he or she is rehabilitated, or that the substance of the former offense is not reasonably related to the occupation or profession for which he or she seeks to be licensed.

The Occupational License for Former Offenders Act does not apply to insurance producer licensing decisions. In March 2002, section 1204 of the Insurance Code was amended by Public Act 228 of 2001 which eliminated "good moral character" as a licensing criterion for insurance producers. Instead, the statute under which insurance producers are licensed simply prohibits the Commissioner from issuing a producer license to any individual who has been convicted of a felony. Because Respondent has been convicted of a felony, he is not qualified to hold an insurance producer license. The question of licensure ends here; the Commissioner does not have the discretion to approve an application where an applicant has been convicted of a felony.

It is not claimed that Respondent, by virtue of his felony conviction, lacks good moral character. Rather, the felony conviction shows that Respondent does not meet the minimum

licensing requirements of Section 1205(1) of the Insurance Code. When an applicant has a felony conviction, the only possible outcome is that the application "shall not be approved." The insurance producer licensing statute does not confer upon the Commissioner the kind of discretion which Respondent claims the Commissioner possesses. Respondent's arguments are based on the assumption that the Commissioner has the latitude to make judgments concerning "good moral character" in insurance producer licensing decisions. The relevant Insurance Code provisions do not confer that discretion. Respondent's arguments regarding constitutionality and statutory construction are based on the premise that the Commissioner is empowered, or required, to make judgments about "good moral character" in insurance producer licensing cases. That premise is incorrect and, for that reason, the arguments based on that premise are not persuasive.

The Commissioner concludes that Respondent, by virtue of his felony conviction, is not qualified to hold a Michigan insurance producer license. Petitioner's motion for summary decision is granted.

ORDER

Therefore, it is ORDERED that the Petitioner's application for licensure is denied.

A handwritten signature in black ink, appearing to be 'K. Ross', written over a horizontal line.

Ken Ross
Commissioner